

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Jun 02, 2020**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CARISSA F.,

Plaintiff,

v.

ANDREW M. SAUL, Commissioner  
of the Social Security Administration,

Defendant.

No: 1:19-CV-03126-FVS

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 10, 12. This matter was submitted for consideration without oral argument. Plaintiff is represented by attorney D. James Tree. Defendant is represented by Special Assistant United States Attorney Joseph J. Langkamer. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, the Court **GRANTS, in part,** Plaintiff's Motion for Summary Judgment, ECF No. 10, and **DENIES** Defendant's Motion for Summary Judgment, ECF No. 12.

## JURISDICTION

Plaintiff Carissa F.<sup>1</sup> filed applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) on March 15, 2016, Tr. 91-92, alleging disability since August 1, 2015, Tr. 240, 247, due to fibromyalgia, degenerative disc disease, Minear's disease, chronic headaches, numbness in her hands bilaterally, and thoracic outlet, Tr. 274. Benefits were denied initially, Tr. 140-55, and upon reconsideration, Tr. 158-69. A hearing before Administrative Law Judge Ilene Sloan ("ALJ") was conducted on February 6, 2018. Tr. 37-61. Plaintiff was represented by counsel and testified at the hearing. *Id.* The ALJ also took the testimony of vocational expert Kimberly Mullinax. *Id.* The ALJ denied benefits on July 5, 2018. Tr. 15-28. The Appeals Council denied Plaintiff's request for review on April 9, 2019. Tr. 1-6. The matter is now before this Court pursuant to 42 U.S.C. §§ 405(g); 1383(c)(3). ECF No. 1.

## BACKGROUND

The facts of the case are set forth in the administrative hearing and transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner. Only the most pertinent facts are summarized here.

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<sup>1</sup>In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's first name and last initial, and, subsequently, Plaintiff's first name only, throughout this decision.

1 Plaintiff was 48 years old at the alleged onset date. Tr. 240. She received  
2 her GED in 1985. Tr. 275. Plaintiff's reported work history includes jobs as a  
3 phlebotomist and a paraeducator. Tr. 275, 288. At application, she stated that she  
4 stopped working on December 1, 2009, due to her conditions. Tr. 274.

### 5 STANDARD OF REVIEW

6 A district court's review of a final decision of the Commissioner of Social  
7 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
8 limited; the Commissioner's decision will be disturbed "only if it is not supported  
9 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,  
10 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a  
11 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159  
12 (quotation and citation omitted). Stated differently, substantial evidence equates to  
13 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and  
14 citation omitted). In determining whether the standard has been satisfied, a  
15 reviewing court must consider the entire record as a whole rather than searching  
16 for supporting evidence in isolation. *Id.*

17 In reviewing a denial of benefits, a district court may not substitute its  
18 judgment for that of the Commissioner. If the evidence in the record "is  
19 susceptible to more than one rational interpretation, [the court] must uphold the  
20 ALJ's findings if they are supported by inferences reasonably drawn from the  
21 record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”  
2 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate  
3 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The  
4 party appealing the ALJ’s decision generally bears the burden of establishing that  
5 it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

### 6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within  
8 the meaning of the Social Security Act. First, the claimant must be “unable to  
9 engage in any substantial gainful activity by reason of any medically determinable  
10 physical or mental impairment which can be expected to result in death or which  
11 has lasted or can be expected to last for a continuous period of not less than twelve  
12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s  
13 impairment must be “of such severity that he is not only unable to do his previous  
14 work[,] but cannot, considering his age, education, and work experience, engage in  
15 any other kind of substantial gainful work which exists in the national economy.”  
16 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to  
18 determine whether a claimant satisfies the above criteria. See 20 C.F.R. §§  
19 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner  
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),  
21 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the

1 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
2 404.1520(b), 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis  
4 proceeds to step two. At this step, the Commissioner considers the severity of the  
5 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
6 claimant suffers from "any impairment or combination of impairments which  
7 significantly limits [her] physical or mental ability to do basic work activities," the  
8 analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the  
9 claimant's impairment does not satisfy this severity threshold, however, the  
10 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
11 404.1520(c), 416.920(c).

12 At step three, the Commissioner compares the claimant's impairment to  
13 severe impairments recognized by the Commissioner to be so severe as to preclude  
14 a person from engaging in substantial gainful activity. 20 C.F.R. §§  
15 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more  
16 severe than one of the enumerated impairments, the Commissioner must find the  
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

18 If the severity of the claimant's impairment does not meet or exceed the  
19 severity of the enumerated impairments, the Commissioner must pause to assess  
20 the claimant's "residual functional capacity." Residual functional capacity  
21 ("RFC"), defined generally as the claimant's ability to perform physical and

1 mental work activities on a sustained basis despite his or her limitations, 20 C.F.R.  
2 §§ 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of  
3 the analysis.

4 At step four, the Commissioner considers whether, in view of the claimant's  
5 RFC, the claimant is capable of performing work that he or she has performed in  
6 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).  
7 If the claimant is capable of performing past relevant work, the Commissioner  
8 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).  
9 If the claimant is incapable of performing such work, the analysis proceeds to step  
10 five.

11 At step five, the Commissioner considers whether, in view of the claimant's  
12 RFC, the claimant is capable of performing other work in the national economy.  
13 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,  
14 the Commissioner must also consider vocational factors such as the claimant's age,  
15 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
16 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the  
17 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
18 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other  
19 work, analysis concludes with a finding that the claimant is disabled and is  
20 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

21 The claimant bears the burden of proof at steps one through four. *Tackett v.*

1 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,  
2 the burden shifts to the Commissioner to establish that (1) the claimant is capable  
3 of performing other work; and (2) such work “exists in significant numbers in the  
4 national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v. Astrue*,  
5 700 F.3d 386, 389 (9th Cir. 2012).

### 6 THE ALJ’S FINDINGS

7 At step one, the ALJ found that Plaintiff has not engaged in substantial  
8 gainful activity since August 1, 2015, the alleged onset date. Tr. 18. At step two,  
9 the ALJ found that Plaintiff has the following severe impairments: lumbar spine  
10 degenerative disc disease; status-post C5-6 anterior cervical discectomy and  
11 fusion; and status post bilateral carpal tunnel release. Tr. 19. At step three, the  
12 ALJ found that Plaintiff does not have an impairment or combination of  
13 impairments that meets or medically equals the severity of a listed impairment. Tr.  
14 20. The ALJ then found that Plaintiff has the RFC to perform light work as  
15 defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b) except she has the following  
16 limitations:

17 [T]he claimant can occasionally climb ramps and stairs and never climb  
18 ladders, ropes, or scaffolds. She can occasionally balance, stoop, kneel,  
19 crouch, and crawl. The claimant must avoid concentrated exposure to  
20 hazards. She can occasionally reach overhead bilaterally. She can  
push/pull, such as operations of foot pedals occasionally. The claimant  
can stand/walk for four out of eight hours and sit for six out of eight  
hours. She can engage in frequent handling and fingering.

21 Tr. 21. At step four, the ALJ identified Plaintiff’s past relevant work as

1 telemarketer and a teacher aid, and found that she is capable of performing this  
2 past relevant work both as actually performed and as generally performed. Tr. 26.  
3 As an alternative to a step four denial, the ALJ made a step five determination that,  
4 considering Plaintiff's age, education, work experience, and RFC, there are other  
5 jobs that exist in significant numbers in the national economy that Plaintiff can  
6 perform, including: cashier II and storage rental clerk. Tr. 27. The ALJ concluded  
7 that Plaintiff has not been under a disability, as defined in the Social Security Act,  
8 from August 1, 2015, through the date of her decision. Tr. 28.

### 9 ISSUES

10 Plaintiff seeks judicial review of the Commissioner's final decision denying  
11 her DIB under Title II of the Social Security Act and SSI benefits under Title XVI  
12 of the Social Security Act. ECF No. 10. Plaintiff raises the following issues for  
13 this Court's review:

- 14 1. Whether the ALJ erred at step two;
- 15 2. Whether the ALJ erred in weighing the medical source opinions;
- 16 3. Whether the ALJ properly considered Plaintiff's symptom claims; and
- 17 4. Whether the case should be remanded for an immediate award of benefits.

### 18 DISCUSSION

#### 19 1. Step Two

20 Plaintiff challenges the ALJ's determination that her fibromyalgia was not a  
21 medically determinable impairment and that her migraines were not severe. ECF



1 No. 10 at 4-9.

2 Step-two of the sequential evaluation process requires the ALJ to determine  
3 whether or not the claimant “has a medically severe impairment or combination of  
4 impairments.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation  
5 omitted). “An impairment or combination of impairments can be found ‘not  
6 severe’ only if the evidence establishes a slight abnormality that has ‘no more than  
7 a minimal effect on an individual[’]s ability to work.’” *Id.* at 1290.

8 To show a severe impairment, the claimant must first establish the existence  
9 of a medically determinable impairment by providing medical evidence consisting  
10 of signs, symptoms, and laboratory findings; the claimant’s own statement of  
11 symptoms, a diagnosis, or a medical opinion is not sufficient to establish the  
12 existence of an impairment. 20 C.F.R. §§ 404.1521, 416.921. “[O]nce a claimant  
13 has shown that [s]he suffers from a medically determinable impairment, [s]he next  
14 has the burden of proving that these impairments and their symptoms affect [her]  
15 ability to perform basic work activities.” *Edlund v. Massanari*, 253 F.3d 1152,  
16 1159-60 (9th Cir. 2001). At step two, the burden of proof is squarely on the  
17 Plaintiff to establish the existence of any medically determinable impairment(s)  
18 and that such impairments(s) are severe. *Tackett*, 180 F.3d at 1098-99 (In steps  
19 one through four, the burden of proof rests upon the claimant to establish a prima  
20 facie case of entitlement to disability benefits.).

21 In her step two determination, the ALJ found that Plaintiff’s fibromyalgia is

1 not a medically determinable impairment and Plaintiff's migraines are not severe.  
2 Tr. 19. In addressing Plaintiff's fibromyalgia, the ALJ found that the record does  
3 not include evidence of the diagnostic criteria for fibromyalgia as set forth in  
4 S.S.R. 12-2p. *Id.* However, this determination is not supported by substantial  
5 evidence.

6 Social Security Ruling 12-2p provides two sets of diagnostic criteria for  
7 fibromyalgia, based on the 1990 American College of Rheumatology Criteria for  
8 the Classification of Fibromyalgia and the 2010 American College of  
9 Rheumatology Preliminary Diagnostic Criteria. Under to the first set of criteria, a  
10 person suffers from fibromyalgia if: (1) she has widespread pain that has lasted at  
11 least three months (acknowledging that pain may "fluctuate in intensity and may  
12 not always be present"); (2) she has tenderness in at least eleven of eighteen  
13 specified points on her body; and (3) there is evidence that other disorders are not  
14 accounting for the pain. *Id.* at \*2–3. Under the second set of criteria, a person  
15 suffers from fibromyalgia if: (1) she has widespread pain that has lasted at least  
16 three months (again, acknowledging that pain may "fluctuate in intensity and may  
17 not always be present"); (2) she has experienced repeated manifestations of six or  
18 more fibromyalgia symptoms, signs, or co-occurring conditions, "especially  
19 manifestations of fatigue, cognitive or memory problems ("fibro fog"), waking  
20 unrefreshed, depression, anxiety disorder, or irritable bowel syndrome"; and (3)  
21 there is evidence that other disorders are not accounting for the pain. *Id.* at \*3.

1 Here, the ALJ found that the second and third prongs of both sets of  
2 diagnostic criteria are not established in the record:

3 I find that the record does not include evidence of at least 11 positive  
4 tender points on physical examination or of repeated manifestations of  
5 six or more fibromyalgia symptoms, signs, or co-occurring conditions.  
6 Furthermore, I find that the record does not include any evidence of  
7 exclusion of other disorders that could cause the symptoms, signs, or  
8 co-occurring conditions.

9 Tr. 19. However, the record does contain a physical examination showing at least  
10 11 positive tender points on physical examination. In Dr. Drenguis' June 15, 2016  
11 examination showed 16 discrete tender points that persisted with distraction. Tr.  
12 402. Defendant argues that there is no evidence that this tender points test matches  
13 the criteria set forth in 12-2p. ECF No. 12 at 15. However, this is a *post hoc*  
14 rationalization that will not be considered by the Court. *See Orn v. Astrue*, 495  
15 F.3d 625, 630 (9th Cir. 2007) (The Court will "review only the reasons provided  
16 by the ALJ in the disability determination and may not affirm the ALJ on a ground  
17 upon which he did not rely."). The record contained evidence of at least 11 tender  
18 points as required in S.S.R. 12-2p, and the ALJ failed to discuss the evidence.  
19 Therefore, whether the test was performed accurately is not an issue to be  
20 reviewed.

21 Furthermore, the record contains evidence that Plaintiff has experienced  
repeated manifestations of six or more fibromyalgia symptoms, signs, or co-  
occurring conditions. The ALJ found that Plaintiff reported symptoms of fatigue,

1 digestive issues, insomnia, and intermittent confusion which was not reported  
2 elsewhere in the record. Tr. 19. However, on May 1, 2015 Plaintiff reported  
3 difficulty falling asleep and difficulty staying asleep. Tr. 366. Plaintiff has a  
4 diagnostic history of insomnia, depression, and anxiety. Tr. 366, 373, 429, 437,  
5 494, 508. She has been treated for reflux. Tr. 432, 437, 440, 443, 494. The ALJ  
6 acknowledged that Plaintiff suffered from chronic headaches and identified them  
7 as a medically determinable impairment. Tr. 19. Additionally, Plaintiff had  
8 muscle aches associated with fibromyalgia. Tr. 509. All of these are repeated  
9 manifestation of fibromyalgia symptoms and signs that can be found in the record.  
10 Again, demonstrating that the ALJ's determination is not supported by substantial  
11 evidence.

12 Third, the ALJ found that while Dr. Drenguis diagnosed fibromyalgia he  
13 failed to exclude other causes for her symptoms. Tr. 19. This is also not supported  
14 in the record. Dr. Drenguis reviewed evidence concerning Plaintiff's cervical  
15 stenosis and chronic pain. Tr. 399. Additionally, Dr. Drenguis ordered x-rays of  
16 Plaintiff's cervical and thoracic spine. Tr. 402. Therefore, the ALJ's step two  
17 determination finding that Plaintiff's fibromyalgia was not medically determinable  
18 is not supported by substantial evidence.

19 The ALJ also found that Plaintiff's migraine headaches are medically  
20 determinable, but not severe. Tr. 19. She stated that Plaintiff "testified that her  
21 migraines had improved and that she was not on any medications for migraines."

1 *Id.* At the hearing, Plaintiff testified that “[b]efore I had the spinal stimulator in  
2 my neck, I had severe migraines. Those are doing better.” Tr. 43. She confirmed  
3 that she did not take medications for her migraines. *Id.* Plaintiff further testified  
4 that prior to the spinal stimulator, migraines would result in her needing to lay in a  
5 dark room a few times a month. Tr. 49-50. Prior to the stimulator implant,  
6 Plaintiff reported headaches to her providers. Tr. 354, 361, 365-66, 370, 373, 376,  
7 379, 405, 407, 428, 430. Plaintiff alleged an onset date of March 15, 2016, and she  
8 received her stimulator implant on October 11, 2016. Tr. 469. Therefore, by  
9 concluding that the migraines are not severe because they have improved, the ALJ  
10 fails to address the severity of Plaintiff’s migraines for the period from onset to the  
11 stimulator implant. The ALJ was tasked with addressing Plaintiff’s claim from the  
12 alleged onset date through the date of the decision. Tr. 190-91. Therefore, this  
13 was an error.

14 Defendant argues that even if the ALJ erred at step two, any error would be  
15 harmless because the step two determination was made in Plaintiff’s favor. ECF  
16 No. 12 at 16. However, the ALJ also erred in her treatment of Dr. Drenguis’  
17 opinion. *See infra*. Therefore, the Court need not address whether the step two  
18 error was harmful. Upon remand, the ALJ will make a step two determination  
19 properly addressing Plaintiff’s fibromyalgia and migraine headaches.

## 20 **2. Medical Source Opinions**

21 Plaintiff challenges the weight the ALJ assigned to Dr. Drenguis and Dr. Dr.

1 Irwin. ECF No. 10 at 9-15.

2 There are three types of physicians: “(1) those who treat the claimant  
3 (treating physicians); (2) those who examine but do not treat the claimant  
4 (examining physicians); and (3) those who neither examine nor treat the claimant  
5 [but who review the claimant's file] (nonexamining [or reviewing] physicians).”  
6 *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001) (citations omitted).  
7 Generally, a treating physician's opinion carries more weight than an examining  
8 physician's, and an examining physician's opinion carries more weight than a  
9 reviewing physician's. *Id.* If a treating or examining physician's opinion is  
10 uncontradicted, the ALJ may reject it only by offering “clear and convincing  
11 reasons that are supported by substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d  
12 1211, 1216 (9th Cir. 2005). Conversely, “[i]f a treating or examining doctor's  
13 opinion is contradicted by another doctor's opinion, an ALJ may reject it by  
14 providing specific and legitimate reasons that are supported by substantial  
15 evidence.” *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995)).

16 On June 16, 2016, Dr. Drenguis completed a consultative examination and  
17 opined that Plaintiff could walk for four hours due to her fibromyalgia, could sit  
18 six hours, could lift and carry 20 pounds occasionally and 10 pounds frequently,  
19 could occasionally climb, balance, stoop, kneel, crouch and crawl, and could  
20 occasionally reach, handle, finger and feel. Tr. 403. He also opined that she was  
21 limited working at heights due to her poor balance with a history of Meniere’s

1 disease. *Id.* The ALJ gave the opinion “little weight” for three reasons: (1)  
2 Plaintiff’s fibromyalgia is not a medically determinable impairment; (2) her lumbar  
3 sprain is not a medically determinable impairment; and (3) the record does not  
4 support a limitation to occasional reaching, handling, fingering, and feeling.

5 The first reason the ALJ provided, that Plaintiff’s fibromyalgia is not a  
6 medically determinable impairment at step two, is not supported by substantial  
7 evidence. As addressed at length above, the ALJ’s determination regarding  
8 Plaintiff’s fibromyalgia was not supported by the evidence in the record.

9 The ALJ’s second reason for rejecting the opinion, that lumbar sprain is not  
10 a medically determinable impairment, is not specific and legitimate. The ALJ  
11 found Plaintiff’s lumbar spine degenerative disc disease to be a severe impairment  
12 at step two. Tr. 19. Dr. Drenguis found that Plaintiff had low back pain, stating  
13 that “[o]n today’s examination, there is tenderness. There were no radicular  
14 findings. No x-rays are available to evaluate degenerative processes. This is  
15 consistent with at least a chronic lumbar sprain. Prognosis is fair.” Tr. 403.  
16 Therefore, the ALJ’s conclusion that Dr. Drenguis’ opinion should be rejected  
17 because he conservatively diagnosed her with a lumbar strain is inconsistent with  
18 the step two finding of a severe impairment of degenerative disc disease of the  
19 lumbar spine. Therefore, this reason does not meet the specific and legitimate  
20 standard.

21 The ALJ’s third reason for rejecting the opinion, that the limitations to

1 occasional reaching, handling, fingering, and feeling is not supported in the record,  
2 is not specific and legitimate. Inconsistency with the majority of objective  
3 evidence is a specific and legitimate reason for rejecting physician's opinions.  
4 *Batson*, 359 F.3d at 1195. However, the evidence that the ALJ relies upon to find  
5 that the opinion is unsupported fails to account for the record as a whole. The  
6 evaluation in which Plaintiff reported good results from her carpal tunnel release is  
7 dated May 28, 2015. Tr. 405-07. This is the beginning of the relevant period, and  
8 one year prior to Dr. Drenguis' opinion. What the ALJ failed to address was that  
9 this same appointment discussed a reemergence of symptoms in her upper  
10 extremities, specifically her shoulders. Tr. 405-07. She also reported to Dr.  
11 Drenguis that her upper extremity symptoms were beginning to return. Tr. 400.  
12 On examination, Plaintiff had a reduced grip strength. Tr. 401. Additionally, her  
13 sensory exam showed a decreased sensation in the right hand ulnar nerve  
14 distribution and left hand median nerve distribution. Tr. 402. He diagnosed  
15 Plaintiff was a mild right ulnar neuropathy and a mild left carpal tunnel syndrome.  
16 Tr. 403. The ALJ concluded that these mild diagnoses did not correlate with the  
17 limitation of occasional use. Tr. 25. However, the ALJ appears to overlook the  
18 reemergence of Plaintiff's symptoms in her upper extremities as a whole, and the  
19 fact that Dr. Drenguis limited her to occasional use in all activities of the upper  
20 extremities, including reaching, handling, fingering, and feeling. The ALJ's  
21 conclusion that the mild right ulnar neuropathy and a mild left carpal tunnel



1 syndrome cannot account for the limitation to occasional use of the entire upper  
2 extremity fails to take into account any upper extremity limitations caused by  
3 Plaintiff's cervical neck impairment, which Dr. Drenguis stated was progressing  
4 based on the symptoms demonstrated at the evaluation. Tr. 403. Here, the ALJ  
5 was interpreting the evidence without taking into account all the effects of the  
6 impairments in combination. The Ninth Circuit has expressed a reluctance of  
7 relying on a judge's lay opinion of medical evidence. *Hoffman v. Screen Actors*  
8 *Guild-Producers Pension Plan*, 571 Fed.Appx. 588, (9th Cir. 2014) (quoting  
9 *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990) ("Common sense can  
10 mislead; lay intuitions about medical phenomena are often wrong.")).

11 Therefore, the ALJ failed to provide specific and legitimate reasons  
12 supported by substantial evidence for rejecting Dr. Drenguis' opinion. The case is  
13 remanded for the ALJ to properly address the opinion.

14 Plaintiff also challenged the opinion of Dr. Irwin. ECF No. 10 at 14-15.  
15 Since the case is being remanded for the ALJ to address Dr. Drenguis' opinion, the  
16 ALJ will also readdress Dr. Irwin's opinion.

### 17 **3. Plaintiff's Symptom Claims**

18 Plaintiff challenges the ALJ's treatment of her symptom statements. ECF  
19 NO. 10 at 15-21.

20 It is generally the province of the ALJ to make determinations regarding the  
21 reliability of Plaintiff's symptom statements, *Andrews v. Shalala*, 53 F.3d 1035,

1 1039 (9th Cir. 1995), but the ALJ’s findings must be supported by specific cogent  
2 reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent  
3 affirmative evidence of malingering, the ALJ’s reasons for rejecting the claimant’s  
4 testimony must be “specific, clear and convincing.” *Smolen*, 80 F.3d at 1281;  
5 *Lester*, 81 F.3d at 834. “General findings are insufficient: rather the ALJ must  
6 identify what testimony is not credible and what evidence undermines the  
7 claimant’s complaints.” *Lester*, 81 F.3d at 834.

8 The ALJ found Plaintiff’s “statements concerning the intensity, persistence,  
9 and limiting effects of these symptoms are not entirely consistent with the medical  
10 evidence and other evidence in the record for the reasons explained in this  
11 decision.” Tr. 23. The evaluation of a claimant’s symptom statements and their  
12 resulting limitations relies, in part, on the assessment of the medical evidence. *See*  
13 20 C.F.R. §§ 404.1529(c), 416.929(c); S.S.R. 16-3p. Therefore, in light of the case  
14 being remanded for the ALJ to readdress the medically determinable severe  
15 impairments at step two and the medical source opinions in the file, a new  
16 assessment of Plaintiff’s subjective symptom statements is necessary.

#### 17 **4. Remand is Appropriate**

18 Plaintiff requests that the Court remand the case for an immediate award of  
19 benefits. ECF No. 10 at 21.

20 The decision whether to remand for further proceedings or reverse and  
21 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,

1 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate  
2 where “no useful purpose would be served by further administrative proceedings,  
3 or where the record has been thoroughly developed,” *Varney v. Sec’y of Health &*  
4 *Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by  
5 remand would be “unduly burdensome[.]” *Terry v. Sullivan*, 903 F.2d 1273, 1280  
6 (9th Cir. 1990); *see also Garrison v. Colvin*, 759 F.3d 995, 1021 (noting that a  
7 district court may abuse its discretion not to remand for benefits when all of these  
8 conditions are met). This policy is based on the “need to expedite disability  
9 claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that  
10 must be resolved before a determination can be made, and it is not clear from the  
11 record that the ALJ would be required to find a claimant disabled if all the  
12 evidence were properly evaluated, remand is appropriate. *See Benecke v.*  
13 *Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172,  
14 1179-80 (9th Cir. 2000).

15 The Court finds that further administrative proceedings are appropriate. *See*  
16 *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103-04 (9th Cir. 2014)  
17 (remand for benefits is not appropriate when further administrative proceedings  
18 would serve a useful purpose). Here, the ALJ failed to properly address Plaintiff’s  
19 migraine headaches for the period leading up to the implantation of the spinal  
20 stimulator. Plaintiff concedes that there was improvement, ECF No. 10 at 9,  
21 opening the door for different RFC determinations for the periods before and after

1 the implantation. “Where,” as here, “not all essential factual issues have been  
2 resolved, a remand for an award of benefits is inappropriate.” *Treichler*, 775 F.3d  
3 at 1101. Instead, the Court remands this case for further proceedings consistent  
4 with this Order.

5 On remand, the ALJ should readdress the impairments at step two,  
6 reconsider the weight assigned to the medical opinions of Dr. Drenguis and Dr.  
7 Irwin, and reconsider Plaintiff’s symptom claims. In addition, the ALJ should  
8 supplement the record with any outstanding medical evidence. If necessary, the  
9 ALJ should order additional consultative examinations and, if appropriate, take  
10 testimony from a medical expert. The ALJ should reassess Plaintiff’s RFC and  
11 take additional testimony from a vocational expert which includes all of the  
12 limitations credited by the ALJ.

13 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 14 1. Plaintiff’s Motion for Summary Judgment, ECF No. 10, is **GRANTED**,  
15 **in part**, and the matter is **REMANDED** to the Commissioner for  
16 additional proceedings consistent with this Order.

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1 2. Defendant's Motion for Summary Judgment, ECF No. 12, is **DENIED**.

2 The District Court Clerk is directed to enter this Order and provide copies to  
3 counsel. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

4 DATED: this 2<sup>nd</sup> day of June 2020.



8 A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

9 Stanley A. Bastian  
10 United States District Judge  
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